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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 648

CHAN WING CHEUNG, a/k/a BILL WOO, *Petitioner*,

v.

FRANK C. HAGERTY, Officer in Charge, U. S. Immigration and Naturalization Service, Providence, Rhode Island, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Chan Wing Cheung, also known as Bill Woo, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, affirming the judgment of the United States for the District of Rhode Island entered in the above-entitled case on August 6, 1959.

OPINIONS BELOW

The Board of Immigration Appeals, on December 5, 1958, dismissed the petitioner's appeal from an order of a Special Inquiry Officer denying his "petition to re-open," a deportation hearing held on April 17, 1956 (Appendix B, pp. 2-6). The United States District Court for the District of Rhode Island upheld the decision of the Immigration Board, and granted the respondent's motion for summary judgment, 176 F. Supp. 421 (Appendix B, pp. 6-18). The opinion of the Court of Appeals has not yet been officially reported. Appended hereto are copies of the opinion and of the judgment order in case No. 5556, in said court (Appendix B, pp. 19-21).

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the First Circuit were entered on November 19, 1959. This Court has jurisdiction to review this order by writ of certiorari under the provisions of 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. When the petitoner is under an order of deportation does he have a right as a matter of law to qualify under Section 244(a)(3) of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1254(a)(3) for a discretionary suspension of deportation and adjustment of status by the Attorney General?

2. Is there a denial of the petitioner's constitutional right under Article I, Section 9, of the Constitution providing that "No . . . . ex post facto law shall be passed," if he were not allowed to qualify under Sec-

tion 244(a)(3) of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1254(a)(3)?

STATUTES INVOLVED

Section 244 of the Immigration and Nationality Act of 1952, Title 8, United States Code, Section 1254:

> (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—
>
> * * *
>
> (2) last entered the United States within two years prior to or at any time after June 27, 1952; is deportable under any law of the United States solely for an act committed or status existing prior to or at the time of such entry into the United States and is not within the provisions of paragraph (4) of this subsection; was possessed of all of the requisite documents at the time of such entry into the United States; has been physically present in the United States for a continuous period of not less than five years immediately preceding his application under this paragraph, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or
>
> (3) last entered the United States within two years prior to, or at any time after June 27, 1952;

is deportable under any law of the United States for an act committed or status acquired subsequent to such entry into the United States and is not within the provisions of paragraph (4) or (5) of this subsection; was possessed of all of the requisite documents at the time of such entry into the United States; has been physically present in the United States for a continuous period of not less than five years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(4) last entered the United States within two years prior to, or at any time after June 27, 1952; is deportable under paragraph (1) of section 1251(a) of this title insofar as it relates to criminals, prostitutes or other immoral persons, subversives, violators of narcotic laws and similar classes or under paragraph (2) of section 1251(a) of this title, as a person who entered the United States without inspection or at a time or place other than as designated by the Attorney General, or without the proper documents and is not within the provisions of paragraph (5) of this subsection; has been physically present in the United States for a continuous period of not less than ten years after such entry and immediately preceding his application under this paragraph and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued

pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(5) is deportable under paragraphs (4)-(7), (11), (12), (14)-(17), or (18) of section 1251(a) of this title for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after June 27, 1952, is deportable under paragraph (2) of section 1251(a) of this title as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting grounds for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

Title 8, United States Code, Section 1251(a)(2):

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States;

There is reference to old statutes that have been appealed. These are included in Appendix A.

STATEMENT

The statement of facts contained in this petition is limited to the salient facts which the petitioner considers to be dispositive to the granting of a writ of certiorari.

Petitioner, a native and citizen of China, now under Communist control, last entered the United States on August 10, 1950, as a temporary visitor until October 9, 1950, pursuant to Section 3(2) of the Immigration Act of 1924.

Petitioner has resided in the United States continuously since the date of his admission. On May 3, 1955, a warrant of deportation was served upon the petitioner charging him with two violations of the immigration laws (8 U.S.C. 1251(a)(2)), viz:

1. That after admission as a visitor he remained in the United States longer than the period for which he was admitted; and

2. That at the time of entry he was not possessed of the requisite documents according to an Executive Order in effect at that time.

On April 17, 1956, the Special Inquiry Officer found that the second ground for deportation was not supported by the evidence, but ordered the petitioner's deportation under the first ground for deportation.

The petitioner, having exhausted his administrative remedies, then petitioned and received adverse decisions in the United States District Court for the District of Rhode Island (Appendix B, pp. 6-18) and

on appeal to the Court of Appeals for the First Circuit (Appendix B, pp. 19-21).

The petitioner has conceded his deportable status as a "remained longer visitor", but has not conceded his right to qualify for discretionary relief under section 244(a)(3) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1254(a)(3), instead of under section 244(a)(5) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1254(a)(5).

REASONS FOR GRANTING THE WRIT

A. This Case Presents the Necessity of Interpreting the Statute by the Reading of "English", Instead of "Congressional English"

The case of *Commissioner of Internal Revenue, Petitioner* v. *Fred N. Acker*, 28 L. W. 4009, a recent decision of this Court, should be used as a guide in the interpretation of penal statutes.[1] Title 8, U.S.C. Sec. 1254, the statute to be interpreted in this case, is in the nature of a penal statute which imposes a penalty.

This is a case of first impression. The very nature of this case, which concerns the correct application of a deportation statute and a resulting ex post facto problem, requires the Court to protect the constitutional rights of this petitioner. Justice Douglas stated in *Marcello* v. *Bonds*, 349 U.S. 302, at p. 320, that:

> "Deportation may be as severe a punishment as loss of livelihood. See Bridges v. Wixon, 326

[1] "The law is settled that 'penal statutes are to be strictly construed.' *Federal Communications Comm'n* v. *American Broadcasting Co.*, 347 U.S. 284, 296, and that one 'is not to be subjected to a penalty unless the words of the statute plainly impose it,' *Keppel* v. *Tiffin Savings Bank*, 197 U.S. 356, 362. See e.g., *Tiffany* v. *National Bank of Missouri*, 18 Wall. 409, 410; *Elliott* v. *Railroad Co.*, 99 U.S. 573, 576."

U.S. 135, 154, 89 L. ed. 2103, 2115, 65 S. Ct. 1443; Delgadillo v. Carmichael, 332 U.S. 388, 391, 92 L. ed. 17, 19, 68 S. Ct. 10. As Mr. Justice Brandeis stated in Ng Fung Ho v. White, 259 U.S. 276, 284, 66 L. ed. 938, 943, 42 S. Ct. 492, deportation may result 'in loss of both property and life; or of all that makes life worth living.'"

Subsection (e) of Section 19 of the Immigration Act of 1917,[2] penalized aliens, who remained in the United States after their visas had expired, with a deportation penalty. The penalty was mitigated in subsequent amendments to subsection (e) of Section 19 of the Immigration Act of 1917.[3] A moral alien who satisfied certain conditions could avail himself of such lesser penalties as departing to any country of his choice or receiving a mitigated penalty at the discretion of the Attorney General of the United States.

Section 244 of the Immigration and Nationality Act of 1952, Title 8, U.S.C., Sec. 1254, became law June 27, 1952, in lieu of subsection (e) of Section 19 of the Immigration Act of 1917, as amended, which was repealed on June 27, 1952 (c. 477, Title IV, sec. 403(a) (13), (23), 66 Stat. 279, eff. Dec. 24, 1952). The scope of aliens who could avail themselves of mitigated penalties was enlarged to include criminals, prostitutes, or other immoral persons in addition to the formerly covered moral persons. A different term of years was set up as a basis for determining the degree of penalty mitigation with respect to certain alien types.

[2] Feb. 5, 1917, c. 29 sec. 19, 39 Stat. 889, 8 U.S.C. sec. 155(e). (Appendix A, p. 1)

[3] June 28, 1940, c. 439, Title II, sec. 20, 54 Stat. 671; Dec. 8, 1942, c. 697, 56 Stat. 1044; July 1, 1948, c. 783, 62 Stat. 1206. (Appendix A, pp. 1-3)

The Court of Appeals for the First Circuit admitted that the petitioner's position would be sustained in the case if the words of the statute were used to interpret the statute. The court said, "A rigid and literal reading of this rather cumbersome section seemingly supports petitioner's view, but we cannot attribute to Congress such an intention." (Appendix B, p. 21.)

B. Even So, the Petitioner Would Sustain His Position Under This Statute by a Correct Application of Congressional English

The petitioner believes that the strict construction advocated in Argument A should govern in this case, but he also believes that his case is strong enough to win under the congressional intent rationale use by the Court of Appeals (Appendix B, p. 21), and the dissent in *Commissioner of Internal Revenue, Petitioner* v. *Fred N. Acker* (28 L. W. 4011, 4012). The correct application of "congressional English" in order to find congressional intent is well set out by Mr. Justice Frankfurter in the *Acker* case:

> ". . . Congress can be the glossator of the words it legislatively uses either by writing its desired meaning, however odd, into the text of its enactment, or by a contemporaneously authoritative explanation accompanying a statute. The most authoritative form of such explanation is a congressional report defining the scope and meaning of proposed legislation. The most authoritative report is a Conference Report acted upon by both Houses and therefore unequivocally representing the will of both Houses as the joint legislative body.
>
> ". . . if Congress chooses by appropriate means for expressing its purpose to use language with an unlikely and even odd meaning, it is not for this Court to frustrate its purpose. The Court's task is to construe not English but congressional English. Our problem is not what do

ordinary English words mean, but what did Congress mean them to mean."

It is believed that a congressional intent, unfavorable to the petitioner, was arrived at by an incorrect application of "Congressional English". The Court of Appeals for the First Circuit attempted to ascertain what Congress meant the words of this statute to mean largely with the aid of District Judge Day's research and analysis of this subject. District Judge Day attempted to apply "Congressional English" by the correct method as advocated by Mr. Justice Frankfurter, but it is believed that District Judge Day's research and application of his research contained several errors.

Three errors of major importance are believed to have been made by District Judge Day:

1. He failed to note a proposed amendment to S. 2550 (Appendix A, pp. 5-6), which was not passed (proposed amendment found in Appendix A, pp. 6-7 and discussion on the subject on p. 13).

2. He failed to make use of Conference Report No. 2096 (2 U. S. Code Congressional and Administrative News, 82d Cong., Second Sess. 1952, pp. 1753-1756). Discussion of the subject on p. 13.

3. He failed to note the significance of the word "or" being included in the original Senate Bill No. 2550 (Appendix A, pp. 5-6, and excluded in the statute, Title 8, U.S.C. Sec. 1254, as passed. Statute found on pp. 3-5 and discussion on the subject on pp. 13-14.

The chronological history of the Immigration and Nationality Act, which includes the pertinent statute, is set forth by Walter M. Besterman's "Commentary

on The Immigration and Nationality Act", 8 U.S.C.A. pp. 2-4, as follows:

> "The Congressional investigation and study which culminated in the enactment of the Immigration and Nationality Act. . . . originated in the Senate. . . . The Committee on the Judiciary of the Senate reported the final version of the Senate bill in the form of a 'clean bill', S. 2550, on January 29, 1952, while the Committee on the Judiciary of the House reported H.R. 5678, with forty-two amendments, on February 14, 1952. . . . The House of Representatives began consideration of H.R. 5678 on April 23, 1952, and passed it on April 25, 1953. . . . On May 9, 1952, the Senate began consideration of S. 2550, and after nearly two weeks of discussions. . . . passed it. . . ., substituting the final text of S. 2550 for H.R. 5678. The substitute measure was sent to a House-Senate Conference on May 23, 1952, and the report of the conferees was submitted to both Houses on June 9, 1952 (House Report No. 2096). On the following day, June 10, 1952, the House adopted the Conference Report. . . . , while on June 11, 1952, the Senate adopted the report. . . ."

The measure was sent to President Harry S. Truman, who had his veto overidden.

The combining of "remained longer persons" and criminals, prostitutes, or other immoral persons was contained in the original House bill as introduced by Representative Walter on October 9, 1951, and referred to the Committee on the Judiciary (Appendix A, pp. 3-4). The Committee reported the bill on February 14, 1952, with only subsections (3) and (5) of the Section changed (Appendix A, pp. 4-5). "Remained longer persons" was removed from subsection (5) where it had been included in the ten year period with the criminals, prostitutes or other immoral persons, and

added to subsection (3) with the moral persons who had made a subsequent to entry violation and had a discretionary remedy after five years. House Report No. 1365, which accompanied H.R. 5678, pointed out the House intent when it said (2 U. S. Code Congressional and Administrative News, 82nd Congress, Second Session, 1952, pp. 1717, 1718):

> "The third category of section 244(a)(3), as amended by the committee (amendment No. 15), provides for the adjustment of status of a deportable alien who overstays his period of admission or fails to maintain his nonimmigrant status, except one who is of a criminal, subversive, immoral or narcotic class, upon a showing of 5 years' continuous physical presence immediately following the commission of an act or the assumption of a status constituting a ground for deportation, good moral character during that period, and that deportation would result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child who is a citizen or legal resident.
>
> * * *
>
> "The purpose of amendments No. 15 and 16 is to place the alien who is deportable solely on the ground that he overstayed his period of admission or failed to maintain the non-immigrant status in which he was admitted, in the third category above-described. Thus, the amended subsection (3) of section 244(a), would apply to aliens who have lawfully entered the United States, are not guilty of any crime constituting a ground for deportation, have resided in the United States in excess of 5 years, and are able to show that their deportation would result in an exceptional and extremely unusual hardship to the alien himself (it would, for instance, apply to a political refugee), or to the members of the alien's immediate family who are either citizens or lawful permanent residents."

The original Senate bill (S. 2550) (Appendix A, pp. 5-6) provided for five subsections, which subsections made a distinction between criminals, prostitutes or other immoral persons and moral persons, even though at this stage "remained longer persons" and criminals, prostitutes or other immoral persons were included together in subsection (5). Senator Lehman proposed an amendment (Appendix A, pp. 6-7) which provided for three subsections that would remove the distinction between criminals, prostitutes or other immoral persons and mogal persons. The Senate refused this amendment thereby showing that they wanted a distinction made between criminals, prostitutes or other immoral persons and moral persons. It is submitted that District Judge Day, relied on by the Court of Appeals of the First Circuit, did not note this amendment so that he could note this distinction.

Then the bill was submitted to conference because of the disagreeing votes of the two Houses on the amendment of the Senate to the House bill (H.R. 5678) to revise the laws relating to immigration, naturalization, and nationality. Conference Report No. 2096, not considered by the District Judge, stated that "the conferees have exerted every effort to perfect and refine the language of this necessarily complicated and involved measure." (2 U. S. Code Congressional and Administrative News, 82d Cong., 2d. Sess., 1952, p. 1753.) Thus, a look at the statute, Title 8, U.S.C. Sec. 1254, as passed, and the original Senate bill No. 2550 (Appendix A, pp. 5-6) shows that the Senate bill and the final statute are substantially different (the District Judge being mistaken in his converse statement), (Appendix B, p. 15) since the original Senate bill in subsection (5) uses the words "or"

which includes "remained longer persons" and criminals, prostitutes, or other immoral persons in the same bracket while the final bill does not use the word "or" and makes a distinction between the two classes. The elimination of the word "or" in Title 8, U.S.C. Sec. 1254(5) and the rejection of Senator Lehman's proposed amendment by the Senate when they were considering S. 2550, which was substituted for H.R. 5678 and used as a basis for the discussion in the House-Senate Conference on May 23, 1952, shows the "Congressional Intent" of Title 8 U.S.C., Sec. 1254(5). "Person who, has remained longer" as used in subsection (5) is only used as an elaboration of what the criminal type element might have done wrong, as there is a definite distinction made in the final statute between the "moral" type alien of subsections (2) and (3) and the "criminal, prostitute or other immoral" type person of subsections (4) and (5). The distinction is emphasized by the different term of years set up as a basis for determining the degree of penalty mitigation between (2), (3), and (4), (5). (Five years for (2) and (3). Ten years for (4) and (5).)

Even if there were a lack of evidence of congressional intent, the statute would have to be interpreted in favor of the petitioner since the Conference Report lays down the following rule as an aid to legislative intent in the interpretation of the statute when there is variation from either the Senate or House versions of the bill, "(40) . . . Similarly, the conferees believe that they have applied very *broad standards of humanitarianism* in composing the differences between both versions of this legislation as they appeared in the sections governing the granting of suspension of deportation." (Emphasis added) (2 U. S. Code Congres-

sional and Administrative News, 82d Cong., 2d Sess., 1952, p. 1756.)

C. There Will be a Constitutional Violation of Article I, Section 9, "No . . . Ex Post Facto Law Shall Be Passed," If the Petitioner Is Denied Relief Under Subsection (3) of Title 8, Section 1254 of the United States Code

The petitioner's visa expired on October 9, 1950. The law at that time, as it was when he entered the United States at Honolulu, T. H., on August 10, 1950, as a temporary visitor, stated that the Attorney General may suspend the deportation of the petitioner if he had resided continuously in the United States for seven years, and had paid an $18 fee to the Treasury of the United States. (Appendix A, pp. 2-3). Thus, there will not be a violation of the ex post facto laws, if the petitioner can have his penalty mitigated after five years under subsection (3) of Title 8, U.S.C., Section 1254; but there will be a violation if the petitioner has to wait ten years in order to receive a mitigated penalty as provided by subsection (5) of Title 8, U.S.C. Section 1254. (Appendix A, pp. 1-3 for a history of section 19 of the Immigration Act of 1917, 39 Stat. 889-890, as amended in 1940, 54 Stat. 671-673, in 1942, 56 Stat. 1044, and 1948, 62 Stat. 1206.)

Mr. Justice Douglas pointed out in his dissenting opinion in *Marcello* v. *Bonds*, 349 U.S. 302, 319, 99 L. ed. 1107, 1121, 75 S. Ct. 757, that "The Constitution places a ban on all ex post facto laws. There are no qualifications or exceptions." Mr. Justice Black reaffirmed this view in his separate opinion of *Lehmann* v. *United States*, 353 U.S. 685, 1 L. ed. 1125. This school of thought that believes that the ex post facto clause includes all retroactive legislation, civil as well as criminal, has never received the majority viewpoint

in the Supreme Court in an immigration case. However, as Mr. Justice Douglas stated in the *Marcello* case and Mr. Justice Black stated in the *Lehmann* case in *Fletcher* v. *Peck* (U.S.) 6 Cranch, 87, 138, 139, 3 L. ed. 162, 178, 179; *Cummings* v. *Missouri* (U.S.) 4 Wall. 277, 18 L. ed. 356; and *Ex parte Garland* (U.S.) 4 Wall. 333, 18 L. ed. 366, the "Court has refused to limit the protections of the clause to criminal cases and criminal punishments as those terms were defined in earlier times." See also *United States* v. *Lovett*, 328 U.S. 303, 315, 316, 90 L. ed. 1252, 1259, 1260, 66 S. Ct. 1073.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

History of Section 19 of The Immigration Act of 1917, 39 Stat. 889-890, as amended in 1940, 54 Stat. 671-673, in 1942, 56 Stat. 1044, and 1948, 62 Stat. 1206.

Feb. 5, 1917, c. 29, sec. 19, 39 Stat. 889-890, 8 U.S.C. sec. 155(c):

"That at any time within five years after entry. . . . , any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States, ... any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing. . . . shall, upon the warrant of the Secretary of Labor, be taken into custody and deported.

• • •

"*Provided further*, that any person who shall be arrested under the provisions of this section, on the ground that he has entered or been found in the United States in violation of any other law thereof which impose on such person the burden of proving his right to enter or remain, and who shall fail to establish the existence of the right claimed, shall be deported to the place specified in such other law. In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final."

June 28, 1940, c. 439, Title II, sec. 20, 54 Stat. 671-673, 8 U.S.C. sec. 155(c):

This statute is substantially the same as 62 Stat. 1206. However, note the ex post facto provision of this statute:

p. 673, Sec. 22. "No alien shall be deportable by reason of the amendments made by section 20 or 21 on account of any act committed prior to the date of enactment of this Act."

Dec. 8, 1942, c. 697, 56 Stat. 1044, 8 U.S.C. sec. 155(c):

This statute is substantially the same as 62 Stat. 1206.

July 1, 1948, c. 783, 62 Stat. 1206, 8 U.S.C. sec. 155(c):

"An Act

To amend subsection (c) of section 19 of the Immigration Act of 1917, as amended, and for other Purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That subsection (c) of section 19 of the Immigration Act of February 5, 1917, as amended (54 Stat. 671; 56 Stat. 1044; 8 U.S.C. 155(c)), is further amended to read as follows:

"(c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. These reports shall be submitted on the 1st and 15th day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If prior to the close of the session of the Congress next following the session

at which a case is reported, the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law. Deportation proceedings shall not be canceled in the case of an alien who was not legally admitted for permanent residence at the time of his last entry into the United States, unless such alien pays the Commissioner of Immigration and Naturalization a fee of $18 (which fee shall be deposited in the Treasury of the United States as miscellaneous receipts). Upon the cancellation of such proceedings in any case in which fee has been paid the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States and the Secretary of State shall, if the alien was a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the immigration quota of the country of the alien's nationality as defined in section 12 of the Act of May 26, 1924 (8 U.S.C. 212), for the fiscal year then current at the time of cancellation or the next following year in which a quota is available. Provided, that no quota shall be reduced by more than 50 per centum in any fiscal year." Approved July 1, 1948.

H.R. 5678 (original bill presented on Oct. 9, 1951 by Representative Walter) (82nd Cong., 2d Sess.)

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—

• • •

(3) is deportable under any law of the United States for an act committed or status acquired subsequent to such entry into the United States and is not within the provisions of paragraph (4) or (5) of this subsection; was possessed of all the requisite documents at the time of such entry into the United States; has been physically present in the United States for a continuous period of not less than five years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and

proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien, or to his spouse, parent, or child who is a citizen or an alien lawfully admitted for permanent residence; or

* * *

"(5) is deportable under paragraph (2) of section 241(a) as a person who has remained longer in the United States than the period for which he was admitted, or paragraph (4), (5), (6), (7), (11), or (12) of section 241(a) for an act committed or status acquired subsequent to such entry into the United States; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

H.R. 5678 (bill as reported from Committee on the Judiciary and passed on April 25, 1952)
82nd Cong., 2d Sess.

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—

* * *

(3) is deportable under paragraph (2) of section 241(a) as a person who has remained longer in the United States than the period for which he was admitted, or under paragraph (9) of section 241(a) as a person who was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 248, or to comply with the conditions of such

status, or under any law of the United States for an act committed or status acquired subsequent to such entry into the United States and is not within the provisions of paragraph (4) or (5) of this subsection; was possessed of all of the requisite documents at the time of such entry into the United States; has been physically present in the United States for a continuous period of not less than 5 years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child who is a citizen or an alien lawfully admitted for permanent residence; or

• • •

(5) is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15) or (16) of Section 241(a) or under the act of May 19, 1920, as amended, for an act committed or status acquired subsequent to such entry into the United States; has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

S. 2550 (Report No. 11371)
82nd Cong., 2d Sess.
(Calendar No. 1072)

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who is found by the Attorney General to be a desirable resident of the United States and who—

• • •

(3) last entered the United States within two years prior to, or at any time after the date of enactment of this Act; is deportable under any law of the United States for an act committed or status acquired subsequent to such entry into the United States and is not within the provisions of paragraph (4) or (5) of this subsection, was possessed of all the requisite documents at the time of such entry into the United States; has been physically present in the United States for a continuous period of not less than five years immediately following the commission of an act, * * *

* * *

(5) last entered the United States within two years prior to, or at any time after the date of enactment of this Act; is deportable under paragraph (2) of section 241(a) as a person who has remained longer in the United States than the period for which he was admitted, or paragraph (4), (5), (6), (7), (11), or (12) of section 241(a) for an act committed or status acquired subsequent to such entry into the United States; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, * * *

Amendment to S. 2550
82nd Cong., 2d Sess.
(Calendar No. 1072)

Amendment in Senate that failed, introduced by Senator Lehman for himself, Senators Humphrey, Kefauver, Benton, Langer, Kilgore, Morse, Douglas, McMahon, Green, Pastore, Moody, Murray:

"... On page 130, line 6, amend section 244 by striking all of subsections (a), (b), (c), (d), and (e) and substituting the following: Sec. 244 (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—

(1) is deportable under paragraph (1) of section 241(a) insofar as such paragraph does not relate to criminals, prostitutes or other immoral persons, subversives, violators of narcotic laws, and similar classes,

proves that he has been a good moral character for five years and (A) has been in the United States for a continuous period of seven years and establishes that his deportation would result in serious detriment to himself, or (B) establishes that his deportation would result in serious detriment to his spouse, parent, or child who is a citizen of an alien lawfully admitted for permanent residence; or

(2) is deportable under (1) of section 241(a) insofar as it relates to criminals, prostitutes, or other immoral persons, subversives, violators of narcotic laws and similar classes or under paragraph (2) of section 241(a), as a person who entered the United States without inspection or at a time or place other than as designated by the Attorney General, or without the proper documents and is not within the provisions of paragraph (3) of this subsection; and (A) has been physically present in the United States for a continuous period of not less than ten years after such entry and immediately preceding his application under this paragraph and proves that during all of such period he has been and is a person of good moral character, or (B) is a person whose deportation would result in serious detriment to the alien's spouse, parent, or child who is a citizen or an alien lawfully admitted for permanent residence; or

(3) is deportable under paragraph (2) of section 241(a), as a person who has remained longer in the United States than the period for which he was admitted, or paragraph (4), (5), (6), (7), (11), or (12) of section 241(a) for an act committed or status acquired subsequent to such entry into the United States; and (A) has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character or (B) is a person whose deportation would result in serious detriment to the alien's spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

• • •

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 5556.

CHAN WING CHEUNG, A.K.A. BILL WOO, *Plaintiff, Appellant,*

v.

FRANK C. HAGERTY, OFFICER IN CHARGE, U. S. IMMIGRATION AND NATURALIZATION SERVICE, PROVIDENCE, RHODE ISLAND, *Defendant, Appellee.*

Appeal From the United States District Court for the District of Rhode Island.

[176 F. Supp. 421]

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges.*

Thomas F. Vance, Jr., with whom *E. Harold Dick* was on brief, for appellant.

Joseph Mainelli, United States Attorney, with whom *Arnold Williamson, Jr.*, Assistant U. S. Attorney, was on brief, for appellee.

Opinion of the Court.

November 19, 1959.

PER CURIAM. Petitioner, a Chinese national under order of deportation, brought this action in the district court

seeking review of an order of the Board of Immigration Appeals dismissing his appeal from an order of a special inquiry officer which in effect held that petitioner is ineligible to apply to the Attorney General under section 244(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1254(a) (1958), for a discretionary suspension of deportation and adjustment of status. This section, in numbered paragraphs, establishes five categories of deportable aliens who are entitled to seek such relief. The district court dismissed the action. The facts are fully stated in its opinion, 176 F. Supp. 421. The only question on this appeal is whether as matter of law petitioner could qualify under any paragraph of the statute. We agree that he could not.

In this court petitioner concedes that he has no claim under section 244(a)(2), which deals with aliens who are deportable solely for an act committed, or status existing, prior to or at the time of entry. Petitioner is being deported solely on the ground that his right to remain in this country expired in October, 1950, so that since then he has been a person who has remained longer in the United States than the period for which he was admitted. Although this status is specifically covered in section 244(a)(5), petitioner admittedly cannot qualify under paragraph (5) as a whole because he cannot satisfy its further requirement of ten years' residence. Accordingly, he claims under section 244(a)(3), which requires only five years' residence.

Paragraph (3) applies to an alien who is deportable for "an act committed or status acquired subsequent to such entry into the United States and [who] is not within the provisions of paragraph (4) or (5) of this subsection . . ." Paragraph (5), as already stated, expressly includes "remained longer" persons. Petitioner says, however, that he "is not within the provisions of paragraph (5)" because of his insufficient length of residence, so that, accordingly, he is not excluded from paragraph (3). In other words,

he contends that a "remained longer" person whose residence exceeds ten years might apply under paragraph (5), but if his residence is less than ten years, but not less than five, he can apply under paragraph (3) for the same relief.

A rigid and literal reading of this rather cumbersome section seemingly supports petitioner's view, but we cannot attribute to Congress such an intention. On the contrary, careful examination of paragraphs (3) and (5) discloses that the sole reason for placing "remained longer" persons in paragraph (5) is to impose upon such persons a more lengthy residence requirement. Petitioner's construction would defeat the very purpose of the statute.

Judgment will enter affirming the judgment of the District Court.

On the same day, November 19, 1959, the following judgment was entered:

JUDGMENT

November 19, 1959

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ Roger A. Stinchfield,
Clerk.

Thereafter, on November 23, 1959, mandate was stayed until further order of Court.

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JAMES E. BROWNING, Clerk

No. 548

In the Supreme Court of the United States

October Term, 1949

CHAN WING CHEUNG, ALSO KNOWN AS BILL WOO,
PETITIONER,

v.

FRANK C. HASSETT, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, PROVIDENCE, RHODE ISLAND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM R. WILKEY,
Assistant Attorney General,
WARREN E. BURGER,
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Department of Justice,
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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 648

CHAN WING CHEUNG, ALSO KNOWN AS, BILL WOO, PETITIONER,

v.

FRANK C. HAGERTY, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, PROVIDENCE, RHODE ISLAND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 19-21) is reported at 271 F. 2d 903. The opinion of the District Court for the District of Rhode Island (R. 6-18) is reported at 176 F. Supp. 421.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1959 (R. 21). The petition for a writ of certiorari was filed on January 18, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an alien "who has remained longer in the United States than the period for which he was admitted", and who has not been in the country for the ten years required for the suspension of deportation of such an alien under paragraph (5) of Section 244(a) of the Immigration and Nationality Act, is entitled to apply for suspension under paragraph (3), which specifically is made inapplicable to persons "within the provisions of paragraph (4) or (5)".

2. Whether the enactment in 1952 of more stringent conditions for suspension of deportation of aliens constituted *ex post facto* legislation within the prohibition of the Constitution.

STATUTE INVOLVED

The Immigration and Nationality Act of 1952, Section 244(a) (8 U.S.C. 1254(a)), provides in pertinent part:

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—
>
> * * * * *
>
> (2) last entered the United States within two years prior to or at any time after June 27, 1952; is deportable under any law of the United States solely for an act committed or status existing prior to or at the time of such entry into the United States and is not within the provisions of para-

graph (4) of this subsection; was possessed of all of the requisite documents at the time of such entry into the United States, has been physically present in the United States for a continuous period of not less than five years immediately preceding his application under this paragraph, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(3) last entered the United States within two years prior to, or at any time after June 27, 1952; is deportable under any law of the United States for an act committed or status acquired subsequent to such entry into the United States and is not within the provisions of paragraph (4) or (5) of this subsection; was possessed of all of the requisite documents at the time of such entry into the United States; has been physically present in the United States for a continuous period of not less than five years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been

and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(4) last entered the United States within two years prior to, or at any time after June 27, 1952; is deportable under paragraph (1) of section 1251 (a) of this title insofar as it relates to criminals, prostitutes or other immoral persons, subversives, violators of narcotic laws and similar classes or under paragraph (2) of section 1251 (a) of this title, as a person who entered the United States without inspection or at a time or place other than as designated by the Attorney General, or without the proper documents and is not within the provisions of paragraph (5) of this subsection; has been physically present in the United States for a continuous period of not less than ten years after such entry and immediately preceding his application under this paragraph and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney

General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(5) is deportable under paragraphs (4)—(7), (11), (12), (14)—(17), or (18) of section 1251 (a) of this title for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after June 27, 1952, is deportable under paragraph (2) of section 1251 (a) of this title as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the First Circuit affirming the judg-

ment of the District Court for the District of Rhode Island dismissing petitioner's action for review of an order of the Board of Immigration Appeals. The Board had dismissed petitioner's appeal from an order denying his motion to reopen the deportation proceedings for the purpose of an application for suspension of deportation (R. 3, 6).

Petitioner, a native and citizen of China, entered the United States on August 10, 1950, as a temporary visitor until October 9, 1950 (R. 7-8). On April 6, 1956, after a hearing, the Special Inquiry Officer found that petitioner was deportable as one who had remained in the United States beyond the period for which he was admitted (R. 9). Petitioner requested and was granted permission for voluntary departure but failed to depart on the date specified, June 18, 1956 (R. 9-10). On June 28, 1957, petitioner filed a complaint in the District Court for the District of Rhode Island seeking a declaratory judgment that he was eligible for suspension of deportation under Section 244(a)(3), *supra*, pp. 3-4 (R. 11). The district court dismissed the complaint and, subsequently, the Court of Appeals for the First Circuit affirmed "without prejudice to pursuit by the [petitioner] of any further administrative remedy which may be available" (R. 11).

Petitioner then filed an application to reopen the deportation hearing so that he might apply for suspension of deportation under paragraph (2) of Section 244(a), *supra*, pp. 2-3, claiming that his passport had "probably" been "fraudulent" (R. 13). He made no claim under paragraph (3) (R. 11-13). The petition

to reopen was denied on the ground that petitioner was ineligible for suspension of deportation under paragraph (2) or any other paragraph of Section 244(a). the Board of Immigration Appeals, in affirming, pointed out that paragraph (2) is inapplicable to aliens overstaying their permitted time (R. 4).

Petitioner thereupon commenced the instant action in the district court, challenging the holding by the Board of Immigration Appeals, but, in addition, claiming eligibility for suspension of deportation under paragraph (3) (R. 12). The district court, upon extensive analysis of the language and legislative history of Section 244(a), held that petitioner was not within the provisions of paragraphs (2) or (3) (R. 13-17). The court of appeals affirmed *per curiam* (R. 19-21).

ARGUMENT

I. Section 244(a) makes clear that overstayed aliens, along with aliens who have committed the other deportation offenses specifically designated in paragraphs (4) and (5), *supra*, pp. 4-5, must have been physically present in the United States for at least ten years to be eligible for suspension of deportation, and cannot avail themselves of the lesser, five-year requirement of paragraph (3). Congress provided in paragraph (5) that an alien "who has remained longer in the United States than the period for which he was admitted" must have been physically present for not less than ten years thereafter to be eligible for suspension of deportation. Congress, with equal specificity, provided, in paragraph (3), that a five-year period of presence shall be sufficient only in case of an

alien who "is not within the provisions of paragraph (4) or (5)."

The legislative history confirms the intent of Congress to require that overstayed aliens be present in the United States at least ten years to be eligible for suspension of deportation. The Immigration and Nationality Act of 1952 originated in the House as H.R. 5678, introduced by Representative Walter. That bill, like the Act as finally passed, included overstayed aliens in paragraph (5), which required ten years' physical presence in the United States, in contrast to paragraph (3), which required only five years' presence (Pet. App. A, 3-5). The House Judiciary Committee, however, amended H.R. 5678, by, *inter alia*, transferring the provision as to overstayed aliens from paragraph (5) to (3) so that only five years' presence would have been required (Pet. App. A, 4-5). See H. Rep. No. 1365, 82d Cong., 2d Sess., pp. 61-62. As so amended, the bill was reported by the Judiciary Committee on February 14, 1952, and was passed by the House on April 25, 1952. 98 Cong. Rec 4444. The Senate Judiciary Committee, meanwhile, on January 29, 1952, reported S. 2550, which was substantially similar to the original H.R. 5678 insofar as it included overstayed aliens in paragraph (5) (Pet. App. A, 5-6). The Committee report clearly stated (S. Rep. No. 1137, 82d Cong., 2d Sess., pp. 24-25):

> The third category (sec. 244 (a) (3)) provides for the adjustment of status of a deportable alien, *except one* who is of a criminal, subversive, im-

moral, or narcotic class or *who overstays his period of admission* * * * [emphasis added].

* * * * *

The fifth category (sec. 244 (a)(5)) provides for the adjustment of status of a deportable alien of a criminal, subversive, immoral, or narcotic class *or* who *overstays his period of admission* * * * [emphasis added].[1]

These same provisions, along with the remainder of S. 2550, were inserted in H.R. 5678, and passed the Senate on May 22, 1952.[2] 98 Cong. Rec. 5803.

The differences between the House and Senate bills were reconciled in conference. The bill which was reported (and later passed, and repassed, over the President's veto, by both Houses) accepted the Senate ver-

---

[1] This language answers any possible contention that petitioner was not within paragraph (5) because he had not been present in the United States for ten years. It is clear that Congress intended to make paragraph (3) inapplicable to all classes of aliens deportable for the reasons stated in paragraph (5). Petitioner was within paragraph (5), but failed to satisfy one of the several specifications there imposed in order to qualify for suspension.

[2] Petitioner speculates (Pet. 10, 13) that the failure of the Senate to accept an amendment proposed by Senator Lehman and others—which provided for only three subsections instead of five and which grouped overstayed aliens in a subsection including immoral persons (Pet. App. A, 6-7)—showed the Senate's desire to make a distinction between criminals and moral persons. While we think it is impossible to determine which of the various, complex provisions of the amendment led to its rejection, it seems clear that the reason was not because the Senate intended to make the distinction which petitioner suggests. Like the Lehman amendment, both S. 2550, which was preferred to the amendment, and the Act as it finally became law grouped overstayed aliens and immoral persons together in the same subsection.

sion with respect to the issue involved here.[3] Thus, Congress specifically rejected the House provision placing overstayed aliens in paragraph (3) and, instead, deliberately accepted the Senate provision including such deportable aliens in paragraph (5) which requires ten years' presence to be eligible for suspension. Clearly, then, the language of Section 244, as well as its legislative history, conclusively establishes that overstayed aliens are eligible for suspension if, and only if, they meet the requirements of paragraph (5).

2. Petitioner argues (Pet. 15-16) that the enactment of legislation in 1952 increasing to ten years the period of physical presence required for eligibility for suspension of deportation violated the *ex post facto* clause of the Constitution. The long-established and repeatedly reiterated view of this Court, however, has been that "the ex post facto clause does not apply to deportation." *Marcello* v. *Bonds*, 349 U.S. 302, 314; see *Johannessen* v. *United States*, 225 U.S. 227, 242; *Bugajewitz* v. *Adams*, 228 U.S. 585, 591; *Ng Fung Ho* v. *White*, 259 U.S. 276, 280; *Mahler* v. *Eby*, 264 U.S. 32, 39; *United States ex rel. Eichenlaub* v *Shaughnessy*, 338 U.S. 521, 529; *Harisiades* v. *Shaughnessy*, 342 U.S.

---

[3] Petitioner claims (Pet. 10, 13-14) that the Act as passed was "substantially different" from S. 2550. He specifically asserts that by eliminating the word "or" from paragraph (5) of S. 2550, which had included overstayed aliens with immoral persons, the Act made a distinction between the two classes. It is difficult to understand how the elimination of the word "or" could make such a substantial difference as long as the Act retained overstayed aliens within paragraph (5). But, in any event, the Act did retain the word "or" to the same effect as in S. 2550. Cf. S. 2550 (Pet. App. A, 6, paragraph 5, line 6), with Section 244 of the Act (*supra*, p. 5, paragraph 5, line 5).

580, 594-595; *Galvan* v. *Press*, 347 U.S. 522, 531; *Lehmann* v. *United States ex rel. Carson*, 353 U.S. 685, 690. *A fortiori*, then, it does not apply to the conditions for the future exercise of suspension of deportation, which is a matter of grace.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1960.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 648

CHAN WING OHEUNG, a k.a BILL WONG, *Petitioner*

v.

FRANK C. HAGERTY, Officer in Charge, U. S. Immigration and Naturalization Service, Providence, Rhode Island, *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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IN THE

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Chan Wing Cheung, also known as Bill Woo, prays that this Court grant rehearing of its order of March 7, 1960, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the First Circuit in the above-entitled case as prayed for in the petition filed herein on January 18, 1960.

STATEMENT

The statement of facts contained in this petition is limited to the salient facts which the petitioner considers to be dispositive to the granting of the rehearing

and issuing the writ of certiorari. [See Petition for Writ of Certiorari, pp. 6, 7 for remainder of Statement.]

REASONS FOR GRANTING THE REHEARING AND ISSUING THE WRIT

By denying the writ of certiorari, the Court in this case has adopted the arguments of the respondent, which in its Respondent's Brief in Opposition clouded the main argument advanced by the petitioner in his Petition for Writ of Certiorari. The respondent failed to answer the first argument of the petitioner when it attempted to respond to the three questions presented by the Petition for Writ of Certiorari by posing and answering two questions of its own.

I

The Court should reconsider its position on the application of the ex post facto clause to deportation. The Court should not be content, as it has in the past, to draw the broad conclusion that the ex post facto clause does not apply to deportation without applying a satisfactory rationale for that conclusion.

Title 8, U.S.C., Sec. 1254, the deportation statute to be interpreted in the case, is in the nature of a penal statute which imposes a penalty.[1]

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[1] Justice Douglas stated in *Marcello* v. *Bonds*, 349 U.S. 302, at 320, that:

> "Deportation may be as severe a punishment as loss of livelihood. See Bridges v. Wixon, 326 U.S. 135, 154, 89 L. ed. 2103, 2115, 65 S. Ct. 1443; Delgadillo v. Carmichael, 332 U.S. 388, 391, 92 L. ed. 17, 19, 68 S. Ct. 10. As Mr. Justice Brandeis stated in Ng Fung Ho v. White, 259 U.S. 276, 284, 66 L. ed. 938, 943, 42 S. Ct. 492, deportation may result 'in loss of both property and life; or of all that makes life worth living.'"

Mr. Justice Frankfurter, in his majority opinion in *Galvin* v. *Press*, 347 U.S. 522, 531; 98 L. ed. 912, 922, stated, "And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the ex post facto Clause, even though applicable only to punitive legislation should be applied to deportation." (Footnote omitted) Even if the Court does not accept the persuasive argument advanced by Mr. Justice Johnson in *Ogden* v. *Saunders*, (U.S.) 12 Wheat. 213, 271, 6 L. ed. 606, 625, and in *Satterlee* v. *Matthewson*, (U.S.) 2 Pet. 380, 681; 7 L. ed. 458, 561, which demonstrates that the ex post facto clause should apply both to civil and criminal cases, the Court should establish a rationale to show why the ex post facto clause does or does not apply to deportation. Petitioner believes that the consequences of deportation are of such a nature that deportation cases come under the favorable application of the ex post facto clause as established by *Calder* v. *Bull*, (U.S.) 3 Dall. 386, 1 L. ed. 648.

II

The petitioner believes that the Court should accept the first argument advanced in his Petition for Writ of Certiorari (Pet. Brief 7), since the respondent in its Brief in Opposition fails to answer the argument by making no denial of the fact that the statute, *which is in the nature of a penal statute*, should be interpreted by the reading of "English", instead of "congressional English". The respondent simply states what he thinks the statute means, and fails to respond to the statement of the Court of Appeals "A rigid and literal reading of this rather cumbersome section seemingly supports petitioners's view. . . ." (Pet. App. B, 21). This

Court should ignore the respondent's factual thinking and accept as a conclusion of fact the conclusion of the Court of Appeals for the First Circuit, which states that the petitioner's position would be sustained, if the words of the statute were used to interpret the statute.

The respondent makes no denial of the fact that the words of the statute should be used to interpret the statute. This Court should realize that the respondent fails to deny the fact, since *Commissioner of Internal Revenue, Petitioner v. Fred N. Acker*, 28 L. W. 4009, a recent decision of this Court, states that it is settled law that " 'penal statutes are to be strictly construed' . . . and that one 'is not to be subjected to a penalty unless the words of the statute plainly impose it,' . . .". Title 8, U.S.C. Sec. 1254, the statute to be interpreted in this case, is in the nature of a penal statute, since it imposes a penalty.

As stated in the Petition for Writ of Certiorari, this is a case of first impression. The very nature of this case, which concerns the correct application of a deportation statute and a resulting ex post facto problem, requires the Court to protect the constitutional rights of this petitioner. Justice Douglas stated in *Marcello v. Bonds*, 349 U.S. 302, at p. 320, that:

> "Deportation may be as severe a punishment as loss of livelihood. See Bridges v. Wixon, 326 U.S. 135, 154, 89 L. ed. 2103, 2115, 65 S. Ct. 1443; Delgadillo v. Carmichael, 332 U.S. 388, 391, 92 L. ed. 17, 19, 68 S. Ct. 10. As Mr. Justice Brandeis stated in Ng Fung Ho v. White, 259 U.S. 276, 284, 66 L. ed. 938, 943, 42 S. Ct. 492, deportation may result 'in loss of both property and life; or of all that makes life worth living.' "

Subsection (c) of Section 19 of the Immigration Act of 1917,[2] penalized aliens who remained in the United States after their visas had expired, with a deportation penalty. The penalty was mitigated in subsequent amendments to subsection (c) of Section 19 of the Immigration Act of 1917.[3] A moral alien who satisfied certain conditions could avail himself of such lesser penalties as departing to any country of his choice or receiving a mitigated penalty at the discretion of the Attorney General of the United States.

Section 244 of the Immigration and Nationality Act of 1952, Title 8, U.S.C. Sec. 1254, became law June 27, 1952, in lieu of subsection (c) of Section 19 of the Immigration Act of 1917, as amended, which was repealed on June 27, 1952 (c. 477, Title IV, sec. 403(a)(13), (23), 66 Stat. 279, eff. Dec. 24, 1952). The scope of aliens who could avail themselves of mitigated penalties was enlarged to include criminals, prostitutes, or other immoral persons in addition to the formerly covered moral persons. A different term of years was set up as a basis for determining the degree of penalty mitigation with respect to certain alien types.

III

The petitioner believes that the respondent misled the Court in its Brief in Opposition, by emphasizing the congressional intent rationale, which was advocated by the petitioner only in lieu of the absence of acceptance

[2] Feb. 5, 1917, c. 29, sec. 19, 39 Stat. 889, 8 U.S.C. sec. 155(c) Pet. App. A, p. 1.

[3] June 28, 1940, c. 439, Tit. II, sec. 20, 54 Stat. 671; Dec. 5, 1942, c. 690, 56 Stat. 1044; July 1, 1948, c. 783, 62 Stat. 1206 (Pet. App. A, pp. 1-3)

of his argument that this case presents the necessity of interpreting the statute by the reading of "English", instead of "congressional English".

It should be observed, however, that the petitioner has a case strong enough to win under a correct application of "congressional English". Respondent only tends to imply an incorrect inference in its Brief in Opposition when it states "both S. 2550, which was preferred to the amendment, and the Act as it finally became law grouped overstayed aliens and immoral persons together in the same subsection." (Res. Brief 9). Petitioner points out that overstayed aliens are only grouped together with immoral persons in subsection (5) when the aliens are both overstayed and immoral. A moral alien is covered under subsection (3).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a rehearing be granted in the instant case.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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